Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SHANK/BALFOUR BEATTY,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the parties to a collective bargaining agreement include in their contract clear instructions as to the manner in which the contract must be applied, is a court required to vacate an arbitrator's award when the arbitrator ignores these instructions?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner

The petitioner is Shank/Balfour Beatty, a joint venture consisting of two California corporations: M.L. Shank, Inc. and Balfour Beatty Construction, Inc. Neither M.L. Shank, Inc. nor Balfour Beatty Construction, Inc. is a subsidiary of a parent corporation. No publicly held company owns ten percent or more of M.L. Shank, Inc.'s or Balfour Beatty Construction, Inc.'s stock.

Respondent

The respondent is International Union of Operating Engineers, Local No. 12, a labor organization within the meaning of National Labor Relations Act §2(5), 49 Stat. 450, 29 U.S.C. §152(5) (2001).

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Shank/Balfour Beatty ("Shank") respectfully requests that this Court issue a writ of certiorari to review the memorandum opinion and the judgment entered in this case by the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ARBITRATOR'S AWARD BELOW

The memorandum opinion of the Ninth Circuit is unofficially reported at 22 Fed. Appx. 876, 2001 WL 1667798, and is reproduced in App. A at 1a-2a.[1] The order and the judgment of the United States District Court for the Central District of California are unreported and are reproduced in App. B at 3a-14a and in App. C at 15a-16a, respectively. The arbitration opinion and award of arbitrator Howard S. Block, Esq. is unreported. The arbitrator's decision was submitted to the district court as part of a stipulated record and is reproduced in App. I at 49a-59a.

JURISDICTION

The memorandum opinion of the Ninth Circuit was issued on December 26, 2001. Neither party filed a petition for rehearing or suggestion for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2101(c) (2001).

STATUTORY PROVISIONS INVOLVED

This petition raises issues under sections 203(d) and 301 of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 153, 29 U.S.C. §§173(d) and 185 (2001). The text of sections 203 and 301 of the LMRA is set

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[1] "App. __" refers to the pages appendix filed with this petition.

out in App. J at 60a-63a, and in App. K at 64a-65a, respectively.

STATEMENT OF THE CASE

A. Introduction.

The decisions of this Court hold that a labor arbitrator cannot dispense his or her own brand of industrial justice by ignoring unambiguous provisions of a collective bargaining agreement that place limitations upon the exercise of arbitral discretion. The courts are required to vacate such awards.

Shank and respondent International Union of Operating Engineers, Local Union No. 12 ("Local 12") are parties to a project labor agreement ("PLA") on a $1.1 billion water distribution project in Southern California. The PLA contains its own terms and conditions of employment and incorporates other terms from locally negotiated collective bargaining agreements. The parties to the PLA foresaw the likelihood that disputes would arise over which agreement (the PLA or the partially incorporated local collective bargaining agreements) governs where both agreements address the same employment issue. The PLA states succinctly, and in the clearest terms possible, that its provisions shall govern when both agreements cover the same subject.

This case involves a dispute between Shank and Local 12 over the number of employees Shank was required to employ on its cranes. The dispute was submitted to arbitration under the PLA. The parties and the arbitrator agreed that both the local collective bargaining agreement and the PLA contain terms addressing the same employment issue; in fact, the arbitrator found that the two agreements

were in conflict with each other. The arbitrator, therefore, was required to apply the terms of the PLA and to deny Local 12's grievance. The arbitrator, instead, utilizing extrinsic legal principles, concluded that the conflicting terms of the local collective bargaining agreement controlled, and sustained Local 12's grievance.

The Ninth Circuit was required to vacate the arbitrator's award because he failed to follow the PLA's unambiguous instructions. Instead, the Ninth Circuit confirmed the award without even mentioning the critical and controlling language of the PLA. The Ninth Circuit's decision should be reviewed by this Court and reversed.

B. The Stipulated Facts.

The facts of this case are undisputed and are embodied in a stipulation, with accompanying exhibits, that was filed in the district court. Excerpts from the stipulated record are reprinted in App. E, App. F, App. G, App. H, and App. I at 29a-59a. The undisputed facts are summarized below.

The Metropolitan Water District of Southern California ("MWD") is engaged in the construction of a $1.1 billion water distribution pipeline near San Bernardino, California. The project is known as the Inland Feeder Project ("Project"). (App. B at 7a-8a; App. E at 22a; App. G at 28a-29a)

MWD's construction manager, Parsons Constructors, and various labor organizations, including Local 12, entered into a collective bargaining agreement known as the Inland Feeder Project Labor Agreement or PLA, for short. All contractors who perform work on the project must become

bound to the PLA. (App. B at 8a; App. E at 22a-23a; App. G at 28a-29a)

The PLA contains its own terms and conditions of employment. The PLA also adopts and incorporates by reference certain provisions of the "local collective bargaining agreements," also referred to in the PLA as "Schedule A." Local 12's Master Labor Agreement ("MLA") covering Southern California is one of the local collective bargaining agreements that is partially incorporated into the PLA. (App. B at 8a; App. E at 23a; App. G at 35a-36a)

The parties to the PLA foresaw the possibility that the PLA and the incorporated local collective bargaining agreements could cover the same subject matter, and that disputes would arise over which agreement controlled. The bargaining parties, therefore, included a supersession clause (Article II, section 4(a), of the PLA), that provides:

> Where a subject covered by the provisions of this [PLA] is also covered by a [local collective bargaining agreement], the provisions of this [PLA] shall prevail. Where [sic] subject is covered by the provisions of a [local collective bargaining agreement] and is not covered by this [PLA], the provisions of the [local collective bargaining agreement] shall prevail.

(App. G at 35a-36a) The issue raised in this case is whether the arbitrator's award violated the supersession clause of the PLA and, therefore, must be vacated.

Shank is one of the contractors performing work on the Project. Shank is bound by the PLA. (App. B at 8a;

App. E at 22a-23a) Shank used two cranes in performing its work on the Project, a Manitowoc 4100 crane and Lorraine crane. One crane was operated while the other stood by in case the operating crane had to be serviced or repaired. (App. B at 9a; App. E at 23a; App. I at 50a-52a)

Shank employed a crew comprised of an operator and an oiler for operating the crane. Shank also employed two laborers to assist in unloading and loading various cars on trains that went in and out of the tunnel Shank was excavating. From time to time, Shank assigned the oiler to the task of assisting the laborers. (App. I at 50a-52a)

In 1998, a dispute arose between Shank and Local 12 over whether Shank could assign the oiler to assist in the loading and unloading of the train cars. Local 12, relying upon the MLA, took the position that the oiler must be present on the crane at all times and could not perform other work. Shank, on the other hand, relied upon the provisions of the PLA. The PLA guarantees employers the right to determine the number of employees required to perform the work. The PLA further guarantees that "no rules, customs, or practices" would be permitted to require more workers than necessary to perform the work. Local 12 filed a grievance and the issue was presented to arbitration. (App. B at 9a; App. E at 23a-24a; App. I at 50a-53a)

Both the PLA and the MLA address what is referred to in the arbitrator's award as the "manning requirement." The applicable provisions of the PLA state:

> The Contractor shall have the right to determine the competency of all employees, *the number of employees required*, and shall have the sole responsibility for selecting

employees to be laid off. . . .

* * *

The Contractor retains the full and exclusive authority for management of its operations. Except as expressly limited by other provisions of [the PLA], the Contractor retains the right to direct the workforce, including the hiring, promotion, transfer, layoff, discipline or discharge for just cause of its employees; the selection of foremen; the assignment and schedule of work; the promulgation of reasonable work rules; and, the requirement of overtime, the determination of when it will be worked, and the number and identity of employees engaged in such work. *No rules, customs, or practices which limit or restrict productivity, efficiency or the individual and/or joint working efforts of employees shall be permitted or observed.* The Contractor shall utilize any methods or techniques of construction.

(App. G at 38a, 44a-45a (emphasis added); *see also* App. I at 55a-56a)

The MLA, on the other hand, contains the following provisions:

> Crew sizes shall be determined by the individual Contractor except as outlined in Appendix A through D and below:
>
> * * *

> (b) An Engineer-Operator and Engineer-Oiler or Fireman shall constitute a crew and shall be so present on the following equipment at all times: . . . . All cranes (except as excluded elsewhere in this Agreement). . . . The Engineer-Oiler or Fireman shall be under the direct supervision of the Engineer-Operator. The Engineer-Operator or Journeyman-Trainee may be utilized instead of Oiler or Fireman.

(App. H at 48a; *see also* App. I at 53a)

The arbitrator examined the dispute and concluded that there was a conflict between the PLA and the MLA over whether the oiler could assist in the loading and unloading of the train cars. (App. I at 56a) Under the supersession clause of the PLA, the arbitrator had no discretion but to apply the terms of the PLA once he concluded that both agreements covered the same subject. Instead, the arbitrator applied an extrinsic "rule of contract interpretation" that specific language in a contract prevails over more general language. The arbitrator found that the conflicting provisions of the MLA controlled the resolution of the dispute and upheld the grievance.[2] (App. I at 56a) The arbitrator ordered Shank to comply with the MLA's manning requirements in the future. (App. I at 58a-59a)

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[2] During the arbitration, both parties referred to a letter of understanding written after the PLA was negotiated. The arbitrator did not rely upon the letter of understanding in arriving at his conclusion that Shank had to follow the MLA's manning requirements. Therefore, the arbitrator's award is silent with respect to how he interpreted the letter of understanding. (App. B at 12a-13a)

C. The Proceedings Below and Basis for Original Subject Matter Jurisdiction.

Shank filed a complaint to vacate the arbitration award in the United States District Court for the Southern District of California. Local 12 filed an action to confirm the arbitration award. The United States District Court for the Southern District of California granted Local 12's motion to transfer the proceedings to the United States District Court for the Central District of California. The district court had original subject matter jurisdiction under section 301(a) of the LMRA, 29 U.S.C. §185(a). (App. B at 7a, 10a; App. E at 21a-22a)

Local 12 and Shank filed cross-motions for summary judgment. The district court granted Local 12's motion to confirm the arbitration award; the district court denied Shank's motion to vacate the award.[3] (App. B at 3a-14a). The district court's opinion acknowledges that the PLA and the MLA both address the manning requirements applicable to Shank's operations. (App. B at 12a) The district court gave only passing reference to the supersession clause in the PLA. Instead, the court reasoned that whether the PLA or the MLA applied was a question of contract interpretation. The district court speculated that the arbitrator may have treated the MLA and the PLA as one contract and, therefore, the arbitrator properly applied a rule of contract construction that gave preference to specific language over general terms. (App. B at 12a-13a)

Shank appealed the district court's decision to the Ninth Circuit, where the Ninth Circuit examines *de novo* whether to confirm an arbitration award. *SFIC Properties,*

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[3] The district court denied Local 12's request for attorneys' fees. (App. B at 13a-14a)

Inc. v. Machinists, Dist. Lodge 94, 103 F.3d 923, 924 (9th Cir. 1996), *cert denied*, 522 U.S. 823 (1997). The Ninth Circuit agreed with the district court that the PLA and the MLA, when read together, "are ambiguous as to the staffing requirements. . . ." (App. A at 2a) The Ninth Circuit did not mention the supersession clause of the PLA at all. The Ninth Circuit completely ignored this critical provision of the PLA that directed the arbitrator to apply the PLA when, as here, both the PLA and the MLA cover the same employment issue.

REASONS FOR GRANTING THE WRIT

Rule 10 of this Court's rules sets forth the considerations governing a review of the Ninth Circuit's decision on certiorari. Rule 10(a) provides that certiorari may be granted where "a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter. . . ." Rule 10(c) provides that certiorari may be granted where "a United States court of appeals has to decide an important question of federal law that has not been, or should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Ninth Circuit's decision satisfies both criteria for granting a petition for writ of certiorari.

A. The Ninth Circuit's Decision Conflicts With Prior Decisions Of This Court On An Important Question Of Federal Law.

Arbitration is a cornerstone of federal labor policy. The importance of arbitration to federal labor policy is acknowledged in the decisions of this Court, starting with the *Steelworkers Trilogy* decided in 1960. *Steelworkers v.*

Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The strong preference for arbitration is also expressed statutorily in section 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 154, 29 U.S.C. §173(d), which provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The judiciary is assigned a narrow role in reviewing labor arbitration awards. This Court summarized the standards for judicial review of labor arbitration awards last term in *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 121 S. Ct. 1724 (2001) (*per curiam*), as follows:

> Judicial review of a labor-arbitration decision pursuant to [a collective bargaining agreement] is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. We recently reiterated that if an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced that he committed errors does not suffice to overturn his decision.

121 S. Ct. at 1728 (internal quotation marks and citations omitted). In submitting its petition to this Court, Shank recognizes the limited role the courts usually play in the

review of arbitration awards. Shank's petition does not attack those holdings.

Labor arbitration is not compulsory and arbitration awards are not bulletproof. The parties to the collective bargaining agreement completely control the issues to be arbitrated. Whether the parties agreed to arbitrate at all, as well as what issues the parties agreed to arbitrate, is for a court to decide. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 648-49 (1986).

The collective bargaining parties can give the arbitrator whatever instructions they wish. The arbitrator must obey those instructions. For example, the collective bargaining parties can exclude certain disputes from arbitration or limit the arbitrator's discretion in formulating remedies. *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 41 (1987); *AT&T Technologies*, 475 U.S. at 648-51.

Therefore, an important corollary to the standards of judicial review quoted above is that "[t]he arbitrator may not ignore the plain language of the contract. . . ." *Misco*, 484 U.S. at 38. Under this Court's decisions of over forty years, a labor arbitration award must be vacated when it does not draw its essence from the collective bargaining agreement and, instead, reflects efforts by the arbitrator to "dispense his own brand of industrial justice." *Garvey*, 121 S. Ct. at 1728 (citing and quoting *Enterprise Wheel & Car Corp.*, *supra*).

Here, the PLA establishes its own terms and conditions of employment and adopts additional terms from other collective bargaining agreements, such as the MLA. The parties to the PLA removed any doubt as to which agreement governs when both the MLA and the PLA address the same subject. They negotiated a supersession clause

which states, in the clearest terms possible, that the PLA controls "where a subject covered by the provisions of [the PLA] is also covered by [the MLA]."

Local 12, Shank, the arbitrator, the district court judge, and the Ninth Circuit panel all agreed that both the PLA and the MLA address the manning requirements for the cranes operated by Shank. (App. A at 2a; App. B at 12a-13a; App. I at 53a, 55a-56a) Indeed, the arbitrator and Local 12 refer to the provisions of the PLA and the MLA as being in conflict with each other on the manning requirements. (App. D at 19a; App. I at 56a) Once the arbitrator found that the PLA and the MLA covered the same subject matter, the PLA withdrew from the arbitrator the discretion to arrive at a conclusion or "interpretation" that the dispute was controlled by the manning requirements of the MLA. By failing to follow the supersession clause, the arbitrator rendered his award unenforceable.

The Ninth Circuit, in reviewing the arbitrator's award, found that the two contracts were ambiguous as to the staffing requirements. (App. A at 2a) In other words, the Ninth Circuit agreed that the PLA and the MLA both covered the same subject matter. The Ninth Circuit ignored completely the PLA's supersession clause. The Ninth Circuit was required to vacate the arbitration award because the arbitrator failed to follow the unambiguous instructions of the PLA.

The Ninth Circuit's decision, therefore, is in conflict with this Court's prior holdings that arbitration awards will not be enforced if the arbitrator ignores the plain language of the collective bargaining agreement. It is appropriate for this Court to review the Ninth Circuit's decision by writ of certiorari. *Cf.*, *Garvey*, 121 S. Ct. at 1726 (petition for writ of certiorari granted where Ninth Circuit's decision conflicted

with this Court's prior decisions limiting review of an arbitrator's award).

Further guidance is needed from this Court concerning when an arbitrator crosses the line from *properly* interpreting a collective bargaining agreement to *improperly* ignoring plain contractual language limiting his authority. Likewise, the courts need guidance as to how far they can delve into a review of the parties' collective bargaining agreement to ensure that the arbitrator stays within the boundaries established by the contract. Justice Stevens, in his dissent in *Garvey*, explained why further guidance from this Court is warranted.

> Our cases, however, do not provide significant guidance as to what standards a federal court should use in assessing whether an arbitrator's behavior is so untethered to either the agreement of the parties or the factual record so as to constitute an attempt to dispense his own brand of industrial justice. Nor, more importantly, do they tell us how, having made such a finding, courts should deal with the extraordinary circumstances in which the arbitrator's own rulings make clear that, more than being simply erroneous, his finding is completely inexplicable and borders on the irrational. Because our case law is not sufficiently clear to allow me to conclude that the case below was wrongly decided—let alone to conclude the decision was so wrong as to require the extraordinary remedy of summary reversal—I dissent from the Court's disposition of this petition.

121 S. Ct. 1729-30 (Stevens, J., dissenting) (internal quotation marks and citations omitted).

Shank's petition raises an important question of federal arbitration law. Parties negotiating a collective bargaining agreement must be confident that they can rely upon the courts to keep arbitrators within the boundaries erected for the exercise of their discretion. Otherwise, the collective bargaining parties will be reluctant to agree to arbitration as the preferred method of resolving industrial disputes.

This case provides the appropriate opportunity for this Court to provide further guidance to the courts. The facts and the documentary record are undisputed. The language limiting the arbitrator's discretion is clear and unambiguous. The arbitrator was required to apply the terms of the PLA once he recognized that the PLA and the MLA covered the same subject matter. Under the PLA's supersession clause, the arbitrator could not use different rules of contract interpretation to resolve the dispute between Shank and Local 12. Under this Court's decisions, the Ninth Circuit had an obligation to vacate the award because it violated the supersession clause of the PLA. Shank's petition should be granted.

B. The Ninth Circuit's Decision Conflicts With The Decisions Of Other Federal Courts Of Appeals On The Same Important Issue Of Law.

It also is appropriate to grant Shank's petition because the Ninth Circuit's decision conflicts with decisions of the First, Fourth and Sixth circuits. *Georgia-Pacific Corp. v. Local 27, Paperworkers*, 864 F.2d 940 (1st Cir. 1989); *United Postal Serv. v. American Postal Workers Union*, 204 F.3d 523 (4th Cir. 2000); *Morgan Serv., Inc. v.*

Local 323, Chicago and Central States Joint Bd., Amalgamated Clothing and Textile Workers Union, 724 F.2d 1217 (6th Cir. 1984). In each of these cases, the federal appellate court vacated an arbitration award because the arbitrator disobeyed unambiguous instructions in a collective bargaining agreement that limited the arbitrator's authority. The Ninth Circuit employed no such analysis in this case. Indeed, the Ninth Circuit's decision makes no reference whatsoever to the supersession clause in the PLA.

In *Georgia-Pacific Corp.*, *supra*, the collective bargaining agreement contained a disciplinary provision that allowed employees to be terminated for cause, but listed a number of offenses that could result in immediate termination without prior progressive discipline. One of those grounds was dishonesty.

The arbitrator's decision acknowledged that the employee was discharged for dishonesty. However, the arbitrator found that the company did not have just cause to discharge the employee and ordered reinstatement without back pay.

The First Circuit examined the collective bargaining agreement and found that the collective bargaining agreement's language was clear and unambiguous. Once dishonesty was established, no further showing was required to terminate an employee. The First Circuit found that the arbitrator was barred from pursuing any further inquiry regarding the justification for the employee's termination. Such additional probing constituted ignoring the plain language of the contract. 864 F.2d at 945. The First Circuit ordered that the arbitration award be vacated. *Accord*, *S.D. Warren Paper Co. v. Paperworkers*, 845 F.2d 3 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988) (finding that

there was no ambiguity in the contract and, as a result, there was no basis for an arbitrator to "fill an empty space" with his expertise).

In *United States Postal Serv.*, *supra*, the collective bargaining agreement unambiguously denied probationary employees access to the grievance procedure as a result of the employees' termination. The employer terminated an employee and the union challenged the termination through arbitration. Ignoring the language of the collective bargaining agreement, the arbitrator held that a probationary employee's grievance was arbitrable. The Fourth Circuit ordered that the arbitration award be vacated because the arbitrator exceeded his authority. The Fourth Circuit stated:

> Parties to a collective bargaining agreement get what they bargain for—no less and no more. If the [union] wished probationary employees to have access to the grievance procedure to challenge a separation, it could have bargained for such a right. Indeed, the [union] remains free to bargain for this right in the future. But the [union] cannot gain through arbitration what it could not acquire through negotiation. If the parties unambiguously agree that a certain class of disputes is not subject to the grievance procedure, *then no arbitrator or court may reach the opposite conclusion*. To permit otherwise would undermine the entire purpose of collective bargaining agreements—namely to allow the parties to control the terms of their relationship through a system of industrial self-government.

204 F.2d at 530 (internal quotation marks and citation omitted) (emphasis added); *accord*, *United Postal Serv. v. American Postal Workers Union*, 922 F.2d 256 (5th Cir.), *cert. denied*, 502 U.S. 906 (1991).

In *Morgan Serv.*, *supra*, an employee was discharged for insubordination. The collective bargaining agreement provided that any employee could be discharged without redress if proven guilty of certain offenses, including insubordination. The Sixth Circuit found that this language was clear and unambiguous, and that the arbitrator was without authority to disregard or modify this provision and apply "customary arbitral procedures." The Sixth Circuit stated:

> Since the agreement contained an express and unambiguous reservation on the arbitrator's powers, the arbitrator could not base his award on customary arbitral procedures that conflict with the agreement.
>
> * * *
>
> A provision in a collective bargaining agreement cannot be treated as ambiguous and then ignored simply because it varies from the arbitrator's expectations. Collective bargaining agreements, like all contracts, are a species of private law. These agreements are made in an effort to erect a system of industrial self-government. The parties to such agreements are free to establish procedures that are different from those of other parties. The parties in this case evidently chose to adopt procedures which

> vary from what is, in the arbitrator's opinion, customary. *In substituting his view of what the parties should have agreed to for what the parties actually did agree to, the arbitrator was dispensing his own brand of industrial justice.*

724 F.2d at 1223-24 (internal quotation marks and citations omitted) (emphasis added).

Here, the Ninth Circuit's decision is in conflict with the decisions cited above. Unlike the other federal courts of appeals, the Ninth Circuit shirked its responsibility to ensure that the arbitrator kept within the bounds established by the parties. The supersession clause placed a clear and unambiguous limitation on the arbitrator's authority. The supersession clause applied to this case because the PLA and the MLA both cover the same subject matter. The arbitrator's award exceeded the limitations of his authority when, instead of applying the PLA, he used extrinsic rules of contract interpretation to find that the MLA governed the resolution of the dispute.

CONCLUSION

Based upon the foregoing, Shank requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-56786
D.C. No. CV-99-00439-RT

[Filed December 26, 2001]

SHANK/BALFOUR BEATTY, a joint venture, Plaintiff-Appellant,	)
v.	)
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, a labor organization, Defendant-Appellee.	)

December 5, 2001[1], Submitted, Pasadena, California

JUDGES:
Before: BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

[1] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

OPINION:

MEMORANDUM[2]

We affirm the district court's judgment confirming an arbitration award.

Shank/Balfour Beatty argues that the arbitrator's decision was contrary to the plain and unequivocal terms of the two collective bargaining agreements, and the arbitrator merely "dispensed his own brand of industrial justice." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424, (1960). We agree with the district court, however, that the two contracts at issue, when read together, are ambiguous as to staffing requirements, and that the arbitrator's opinion offers a plausible interpretation of them. "As bears repeating, 'so far as the arbitrator's decision *concerns* construction of the contract'" -- as it does here -- "the courts have no business overruling him because their interpretation of the contract is different from his." *Hawaii Teamsters & Allied Workers Union v. United Parcel Service*, 241 F.3d 1177, 1183 (9th Cir. 2001) (quoting *Enterprise Wheel*, 363 U.S. at 599) (emphasis in original). We reject Shank's attempt to "open a back door to judicial review of the merits of an arbitration award." *Id.* at 1183.

AFFIRMED.

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[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

No. EDCV 99-439 RT (MCx)

[Filed October 2, 2000]

SHANK/BALFOUR BEATTY,
Plaintiff/Counterdefendant,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12,
Defendant/Counterclaimant.

ORDER 1) Denying Plaintiff/Counterdefendant Shank/Balfour Beatty's Motion for Summary Judgment to Vacate Arbitration Award, 2) Granting Defendant/Counterclaimant International Union of Operating Engineer's, Local Union No. 12's ("Local 12") Motion for Summary Judgment, and 3) Denying Local 12's Motion for Attorney's Fees

The Court has read and considered Plaintiff/Counterdefendant Shank/Balfour Beatty ("Beatty")'s motion for summary judgment to vacate arbitration award,

Defendant/Counterclaimant Local 12's cross-motion for summary judgment, and the moving papers and replies of both parties. Based on such consideration, the Court concludes as follows.

I.

BACKGROUND

This action stems from a dispute between Beatty and Local 12 over how many Engineer-Oilers ("Oilers") were required to be assigned to each of two cranes operated by Beatty during its work on a project for the Metropolitan Water District. The answer turns on an analysis of two operative collective bargaining agreements the Project Labor Agreement ("PLA") and the Master Labor Agreement ("MLA").

Local 12 contends that Beatty has been short one Oiler in its operations. To support its contentions, Local 12 points to a section of the MLA that is commonly referred to as the "manning" provisions. The manning provisions provide, in pertinent part "An Engineer-Operator and Engineer-Oiler or Fireman shall constitute a crew and shall be so present on the following equipment at all times all cranes (except as excluded elsewhere in this Agreement). "Local 12 contends that Beatty was operating two cranes but employed only one Oiler for the two cranes, in violation of the MLA.

Beatty counters that the PLA, not the MLA, governed the number of Oilers assigned to each crane. The PLA provides, in pertinent part "The Contractor shall have the right to determine the competency of all employees, the

number of employees required and shall have sole responsibility for selecting employees to be laid off." Article III, Section 2 of PLA. Beatty contends that the PLA is thus in conflict with the MLA, and points to a provision of the PLA which states that where there is a conflict between the two bargaining agreements, the PLA governs. That PLA provision states, "Where a subject covered by the provisions of this Agreement is also covered by a Schedule A [which includes the MLA], the provisions of this Agreement shall prevail." Article II, Section 4(a) of PLA.

Beatty and Local 12 both point to an October 1996 letter from the president of the project manager which was intended to clarify this very dispute ("letter of understanding"). The letter of understanding states, in pertinent part

> This letter will confirm our understanding concerning the interpretation and application of Article III, Section 2, and Article V, Section I, of the [PLA] as those sections might affect the equipment manning provisions of the Operating Engineers local collective bargaining agreement. In the negotiations, the parties agreed in Article III, Section 2, that the Contractor has the right to determine the number of employees it will hire. You have requested that we clarify, in light of this provision, the effect of the Project Agreement supercession [sic.] clause, Article II, Section 4, upon the various manning requirements contained in the Operating Engineers local agreement.

> As a result of our discussions with you, we have confirmed our mutual interpretation that the equipment manning requirements of the OE local agreement are not superseded and therefore they would apply to set the manning levels for the equipment falling within the jurisdiction of the Operating Engineers, consistent with other provisions of the [PLA]. Article III, Section 2, does not purport to regulate the classifications the Contractor employs on particular equipment, it addresses only the number required. Accordingly, the classifications and functions they perform as set out in the Schedule A are unaffected by this Section.
>
> The Parties also agree in the [PLA] that, "No rules, customs or practices which limit or restrict productivity, efficiency, or the individual and/or joint working efforts of employees shall be permitted or observed." Article V, Section I. This provision, coupled with the right to determine the number of employees hired, is vital to the Contractor's right and responsibility to direct the performance of the work, and does not require more workers than are necessary to perform the work.

Both parties urge that the letter of understanding supports their respective positions on which collective bargaining agreement applied to the manning requirements.

II.

UNCONTROVERTED MATERIAL FACTS

The following are stipulated uncontroverted facts supported by admissible evidence.

Beatty is a joint venture between two California corporations, M. L. Shank Co., Inc. and Balfour Beatty Construction, Inc. Beatty's office and principal place of business is located in Highland, San Bernardino County, California. Beatty is an employer engaged in interstate commerce and in an industry affecting commerce within the meaning of sections 2(6) and 2(7) of the National Labor Relations Act as amended [29 U S C §152(6) and 97)] and within the meaning of section 301(a) [29 U S C §185(a)].

Local 12 is a labor organization which represents employees in an industry affecting commerce and its duly authorized officers or agents are engaged in representing or acting for employee members in, among other areas, San Bernardino County, California. Local 12 transacts business in San Bernardino County and has an office and place of business in San Bernardino County.

The Metropolitan Water District of Southern California has been and is engaged in the construction of a water distribution pipeline and water tunnel near San Bernardino, California. The project is called the Inland Feeder Project ("Project"). Parsons Constructors ("Parsons") is the project manager for the project.

Sometime prior to February 1997, Parsons and various labor organizations, including Local 12, entered into the Inland Feeder Project Labor Agreement ("PLA") which continues in effect through the completion of the project.

On or about February 7, 1997, Beatty signed a letter of assent in which Beatty agreed to abide by the terms and conditions of the PLA for the durations of Beatty's work on the Project.[3]

The PLA adopts and incorporates by reference certain provisions of the local collective bargaining agreements of the union signatories to the PLA, including Local 12. These local collective bargaining agreements are referred to in PLA as "Schedule A's".

The Local 12 MLA covering Southern California is one of the Schedule A's referred to in the PLA.

The PLA provides in Article II, section 4(b) that any dispute as to the applicable source between the PLA and any Schedule A for determining the wages, hours and working

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[3] Although there is a disagreement as to which version of the PLA Beatty agreed to abide by when Beatty signed the letter of assent, this disagreement does not affect in any respect the operative provisions of the PLA which are in issue in this case. That is, both versions of the PLA contain identical provisions relating to the manning requirements which are in issue in this case. Although Beatty does not dispute the authenticity or genuineness of the PLA which Local 12 contends is the PLA to which Beatty became bound by signing the letter of assent, Beatty does not waive its right to argue in later proceedings in other cases that this version of the PLA is not the version to which Beatty became bound by signing the letter of assent.

conditions of employees on the project, shall be resolved under the procedures established in Article VII.

Article VII of the PLA contains a grievance procedure for disputes involving the interpretation or application of the PLA. The grievance procedure provides for final and binding arbitration of all grievances the bargaining parties are unable to settle.

In 1998, a dispute arose between Beatty and Local 12 over the application and interpretation of the PLA regarding the number and classification of employees required to be employed to perform certain work on the Project (hereafter, the "manning provisions").

After Beatty and Local 12 were unable to resolve their dispute over the manning provisions, the dispute was submitted to arbitration on April 7, 1999. The parties selected Howard S. Block ("Block") as the impartial arbitrator to hear and decide the dispute.

On August 10, 1999, Block issued an arbitration award on the manning provision dispute. Block found that Beatty was in violation of the manning provisions of the MLA, and ordered Beatty to comply with "all contractual manning requirements in the future including, but not limited to, the hiring of Oilers for both its Lorraine and Mantowac Cranes." Block denied Local 12's request for damages.

On August 26, 1999, Beatty filed this complaint to vacate the arbitration award in the United States District Court for the Southern District of California. On December 3, 1999, Judge Barry T. Moskowitz granted Local 12's

motion to transfer venue to the Central District of California.

On December 15, 1999, the action was transferred and assigned to the United States District Court for the Central District of California -- Eastern Division.

On March 7, 2000, the parties stipulated to the filing of the instant cross-motions for summary judgment.

III.

ANALYSIS

A. Legal Standard for Reviewing An Arbitration Award

The decision of a labor arbitrator is given great deference, and can only be overturned if the arbitrator's decision failed to "draw[] its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel and Car Corp.* 363 U. S. 593, 597, 80 S. Ct. 1358, 1361 (1960).

The United States Supreme Court in *Enterprise* emphasized that the labor arbitrator, and not the federal courts, should have "the final say on the merits of awards." *Id.* at 596, 80 S. Ct. at 1360. The *Enterprise* Court reasoned "It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599, 80 S. Ct. at 1362. Thus, the federal courts must uphold a labor arbitrator's award so long as it "draws its

essence from the collective bargaining agreement" and the arbitrator does not "dispense his own brand of industrial justice "*Id.* at 597, 80 S. Ct. at 1361.

When reviewing the award of an arbitrator, the court is bound by the findings of the arbitrator. *See Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F. 2d 1200, 1204 (9th Cir. 1989) (en banc) ("when reviewing the award of an arbitrator chosen by the parties to a collective bargaining agreement, we are bound -- under all except the most limited circumstances -- to defer to the decision of another, even if we believe that the decision finds the facts and states the law erroneously "). "The key question is 'whether the arbitrator's interpretation could in some rational manner, be derived from the collective bargaining agreement, viewed in light of its language, its content, and any other indicia of the parties' intention.'" *Desert Palace, Inc. v. Local Joint Executive Board of Las Vegas*, 679 F. 2d 789,791 (9th Cir. 1982), *quoting Local 1020, United Brotherhood of Carpenters v. FMC Corp.*, 658 F. 2d 1285, 1294 (9th Cir. 1981). "The courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument which will support the claim." *Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 567-68, 80 S. Ct. 1343, 1346 (1960).

B. The Parties' Cross-Motions for Summary Judgment

Beatty urges that Block failed to follow the essence of the collective bargaining agreements when he applied the manning provisions of the MLA rather than the PLA in arriving at his decision and award. Beatty contends that the

MLA's specific manning requirements are in conflict with the PLA's statement that "[t]he Contractor shall have the right to determine the competency of all employees, the number of employees required. "Beatty also points to a provision of the PLA which provides that where there is a conflict between the PLA and a Schedule A -- which the parties agree includes the MLA -- the PLA governs.

Local 12 counters that the letter of understanding, which is appended to and made part of the PLA, demonstrates the parties' intent to incorporate the manning requirements of the MLA into the PLA. Local 12 contends that Block found that the parties intended to and did incorporate the specific manning provisions of the MLA into the PLA, and that the PLA therefore did not supercede the MLA as to the manning provisions.

The question of which collective bargaining agreement governs, that is, whether the PLA supercedes the MLA or vice versa, is itself a question of contractual interpretation. Since which collective bargaining agreement is to be applied is itself a question of contract interpretation, this is an issue on which Block, as the arbitrator, should make the final determination. *See Enterprise*, 363 U. S. at 599, 80 S. Ct. at 1362. This Court can only vacate Block s decision if it finds that Block did not follow the essence of the collective bargaining agreements. The Court cannot replace its judgment for Block's. *See Stead Motors*, 886 F. 2d at 1204.

Here, Block applying rules of contractual interpretation determined that the manning provisions of the MLA apply to Beatty. Block did not indicate how he interpreted the letter of understanding. However, he stated

that the MLA manning provisions applied because they are more specific than the provisions of the PLA.

Block's opinion appears to treat the MLA and the PLA as one contract. In his decision, Block states "When, as here, there is a conflict between specific language and general language in an agreement". Thus, Block appears to agree with Local 12 that the letter of understanding incorporated the MLA into the PLA, forming one contract. Because Block could have easily determined that the MLA was incorporated into the PLA through the letter of understanding, Block's determination is a reasonable interpretation of the interplay of the two collective bargaining agreements. Thus, the Court concludes that he followed the "essence" of the PLA and the MLA, and did not "dispense his own brand of industrial justice." *Enterprise*, 363 U.S. at 597, 80 S. Ct. at 136.

Accordingly, Block's arbitration decision and award will not be vacated. Therefore, Beatty's motion for summary judgment will be denied, and Local 12's cross-motion for summary judgment to confirm the arbitration award will be granted.

C. Local 12's Request for Attorney's Fees

In its cross-motion for summary judgment, Local 12 contends that Beatty brought this action to vacate the arbitrator's award in bad faith and therefore seeks attorney's fees associated with defending this action. A court may assess attorneys' fees "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 1622 (1975) (internal quotations

omitted). Here, the Court finds no evidence that Beatty acted in bad faith in bringing this action to vacate the arbitrator's award. Accordingly, Local 12's request for attorney's fees will be denied.

IV.

DISPOSITION

IT IS ORDERED THAT

(l) Beatty's motion for summary judgment is DENIED,

(2) Local 12's motion for summary judgment is GRANTED, and

(3) Local 12's request for attorney's fees is DENIED.

DATED October 2, 2000

/s/ _____
ROBERT J. TIMLIN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

No. EDCV 99-439 RT (MCx)

[Filed October 2, 2000]

SHANK/BALFOUR BEATTY, Plaintiff/Counterdefendant,	)
v.	)
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, Defendant/Counterclaimant.	)

JUDGMENT IN FAVOR OF DEFENDANT/COUNTERCLAIMANT INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION 12

On October 2, 2000 the Court granted defendant/counterclaimant International Union of Operating Engineers, Local Union 12's Motion for Summary Judgement on its counterclaim and denied Plaintiff/Counterdefendant

Shank/Balfour Beatty's ("Beatty")'s motion for summary judgment on its Complaint.

ACCORDINGLY, IT IS ORDERED that Judgment be entered in favor of counterclaimant International Union of Operating Engineers, Local Union No. 12 and against counterdefendant Shank/Balfour Beatty, and the Award of Arbitrator Howard Block dated August 10, 1999 is confirmed in all respects, and judgment is hereby entered consistent therewith,

IT IS FURTHER ORDERED that Judgment be hereby entered in favor of defendant International Union of Operating Engineers, Local Union No. 12 and against plaintiff Shank/Balfour Beatty, on the Complaint to vacate the arbitration award,

IT IS FURTHER ORDERED that plaintiff/counterdefendant Shank/Balfour Beatty shall pay to defendant/counterclaimant International Union of Operating Engineers, Local Union No. 12, costs in the amount of $_____.

Dated: October 2, 2000

/s/_____
Robert J. Timlin
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

No. EDCV 99-439 RT (MCx)

[Filed April 20, 2000]

SHANK/BALFOUR BEATTY, a joint venture,	)
Plaintiff,	)
v.	)
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, a labor organization,	)
Defendants.	)
AND RELATED COUNTERCLAIM	)

JUDGE:
The Hon. Robert J. Timlin

Attorneys for Defendant International Union of Operating Engineers Local Union No. 12:

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House Counsel, IUOE Local Union No. 12
150 E. Corson Street
Pasadena, California 91103
Telephone: (818) 792-8900

NOTICE OF CROSS-MOTION AND CROSS-MOTION BY DEFENDANT LOCAL UNION NO. 12 FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

> [p.10]This term is reserved for those egregious cases in which a court determines that the arbitrator's award ignored the plain language of the contract, that he 'manifestly disregarded' the contours of the bargain expressed in outline by the collective bargaining agreement. In such an instance, the court rules that the arbitrator's award represents an invalid exercise of the power the parties have entrusted to him.

Stead Motors, 886 F.2d at 1206, fn. 6.

With respect to the manning provision, SBB and Local 12 stipulated that Arbitrator Block was empowered to determine whether SBB was in violation of the agreement by not assigning Oilers to its cranes. The parties also authorized the arbitrator to fashion an appropriate remedy in the event he found SBB had violated the agreement. Arbitrator Block responded to the first submission by resolving a conflict in the language of various provisions of the PLA and the MLA, favoring the specific manning mandate over general provisions relating to management rights. Far from exceeding the powers conferred upon him, Arbitrator Block provided an interpretation of the language in dispute, and nothing more. In doing so, he acted entirely within the scope of the PLA, authorizing him to construe the contract and to resolve disagreements between the parties over the incorporation of provisions of the local collective bargaining agreement into the PLA (SE 3, pp. 36-38; pp. 59-60).

Moreover, in determining the appropriate remedy, Arbitrator....

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

No. EDCV 99-439 RT (MCx)

[Filed March 23, 2000]

SHANK/BALFOUR BEATTY, a joint venture,	)
Plaintiff,	)
v.	)
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, a labor organization,	)
Defendants.	)
AND RELATED COUNTERCLAIM	)

JUDGE:
The Hon. Robert J. Timlin

Date: April 20, 2000
Time: 10:00 a.m.

Stephen J. Schultz, #090187
Mark T. Bennett, #089061
MERRILL, SCHULTZ &WOLDS, LIMITED
401 West "A" Street, Suite 2550
San Diego, California 92101
Telephone: (619) 234-4525
Fax: (619) 234-9740

Attorneys for Plaintiff/Counter-Defendant,
Shank/Balfour Beatty

PARTIES' STIPULATION OF UNDISPUTED FACTS FOR CROSS MOTIONS FOR SUMMARY JUDGMENT

The parties, Shank/Balfour Beatty ("Shank") and International Union of Operating Engineers, Local Union No. 12 ("Local 12"), stipulate that the following facts are undisputed and that the documents identified and attached as Exhibits are authentic and genuine as follows:

1. Shank is a joint venture between two California corporations, M.L. Shank Co., Inc. and Balfour Beatty Construction, Inc. Shank's office and principal place of business is located in Highland, San Bernardino County, California. Shank is an employer engaged in interstate commerce and in an industry affecting commerce within the meaning of sections 2(6) and 2(7) of the National Labor Relations Act as amended [29 U.S.C. §152(6) and (7)] and within the meaning of section 301(a) [29 U.S.C. §185(a)].

2. Local 12 is a labor organization which represents employees in an industry affecting commerce and its duly authorized officers or agents are engaged in representing or acting for employee members in, among other areas, San Bernardino County, California. Local 12 transacts business in San Bernardino County and has an office and place of business in San Bernardino County.

3. The parties stipulate that venue is appropriate in this court under section 301(c) of the Labor Management Relations Act [29 U.S.C. §185(c)] and 28 U.S.C. section 1391(b).

4. The Metropolitan Water District of Southern California has been and is engaged in the construction of a water distribution pipeline and water tunnel near San Bernardino, California. The project is called the Inland Feeder Project ("Project"). Parsons Constructors ("Parsons") is the project manager for the project. Sometime prior to February 1997, Parsons and various labor organizations including Local 12, entered into the Inland Feeder Project Labor Agreement ("PLA") which continues in effect through the completion of the project.

5. On or about February 7, 1997, Shank signed a letter of assent in which Shank agreed to abide by the terms and conditions of the PLA for the duration of Shank's work on the Project. Although there is a disagreement as to which version of the PLA Shank agreed to abide by when Shank signed the letter of assent, this disagreement does not affect in any respect the operative provisions of the PLA which are in issue in this case. That is, both versions of the PLA contain identical provisions relating to the manning requirements

which are in issue in this case. Although Shank does not dispute the authenticity or genuineness of the PLA which Local 12 contends is the PLA to which Shank became bound by signing the letter of assent, Shank does not waive its right to argue in later proceedings in other cases that this version of the PLA is not the version to which Shank became bound by signing the letter of assent.

6. The PLA adopts and incorporates by reference certain provisions of the local collective bargaining agreements of the unions signatory to the PLA, including Local 12. These local collective bargaining agreements are referred to in the PLA as Schedule A's. The Local 12 Master Labor Agreement covering Southern California is one of the Schedule A's referred to in the PLA.

7. The PLA provides in Article II section 4(b) that any dispute as to the applicable source between the PLA and any Schedule A for determining the wages, hours and working conditions of employees on the project, shall be resolved under the procedures established in Article VII.

8. Article VII of the PLA contains a grievance procedure for disputes involving the interpretation or application of the PLA. The grievance procedure provides for final and binding arbitration of all grievances the bargaining parties are unable to settle.

9. In 1998, a dispute arose between Shank and Local 12 over the application and interpretation of the PLA regarding the number and classification of employees required to be employed to perform certain work on the Project (hereafter "manning provisions").

10. After Shank and Local 12 were unable to resolve their dispute over the manning provisions, the dispute was submitted to arbitration on April 7, 1999. The parties selected Howard S. Block as the impartial arbitrator to hear and decide the dispute.

11. A transcript of the arbitration hearing held on April 7, 1999 before Arbitrator Block was made. A true and correct copy of the April 7, 1999 arbitration hearing transcript is attached under separate cover as Stipulated Exhibit 1.

12. There were three joint exhibits admitted at the April 7 hearing. Those joint exhibits are as follows:

(a) Joint Exhibit 1 - Grievance Form. A true and correct copy is attached under separate cover as Stipulated Exhibit 2.

(b) Joint Exhibit 2 - Project Labor Agreement. A true and correct copy is attached under separate cover as Stipulated Exhibit 3.

(c) Joint Exhibit 3 - Schedule A, Local 12 Master Labor Agreement. A true and correct copy is attached under separate cover as Stipulated Exhibit 4.

13. After the arbitration hearing held on April 7, 1999, Shank and Local 12 both filed post hearing briefs. True and correct copies of those briefs are attached under separate cover as Stipulated Exhibits 5 and 6.

14. On August 10, 1999, Arbitrator Block issued an arbitration award on the manning provision dispute. A true and correct copy of the arbitration award is attached under separate cover as Stipulated Exhibit 7.

MERRILL, SCHULTZ & WOLDS, LIMITED

By:/s/_____
Stephen J. Schultz
Attorneys for Plaintiff/
Counter Defendant,
Shank/Balfour Beatty

Dated: March 21, 2000

WOHLNER KAPLON PHILLIPS YOUNG & BARSH

By: /s/ _____
Elizabeth H. Rosenfeld
Attorneys for Defendant/
Counterclaimant,
UNION OF OPERATING
ENGINEERS,
LOCAL 12

Dated: March 22, 2000

APPENDIX F

GRIEVANCE FORM
SECTION I

(To be filled out by person making grievance) (Please print)

Date 3/29/99

Name of Employer Shank Balfour & Beatty

Name IUOE Local #12

Company Phone No. 909-425-4070

Home Street Address 1455 Rialto Avenue
City and State Colton, CA Zip Code 92324

Phone No. 909-825-1375

Company Address P.O. Box 129, Highland, Ca.92346

Foreman or Person in charge Jerry Stokes

Give all the facts you can, so grievance can be processed __
Shank Balfour & Beatty is in violation of Article XVI Section M of Schedule A (Master Labor Agreement) for not having an Engineer Oiler assigned to their cranes when they are in operation.

Signed /s/ _____

STIPULATED EXHIBIT 2

APPENDIX G

INLAND FEEDER

Project Labor Agreement

The Metropolitan Water District of Southern California

Parsons Constructors Inc.

STIPULATED EXHIBIT 3

INLAND FEEDER

PROJECT LABOR AGREEMENT

This Project Labor Agreement (hereinafter, the "Agreement") is entered into this first day of August, 1996, by and between Parsons Constructors Inc., its successors or assignees (hereinafter "Parsons" or "Project Contractor") and The Building and Construction Trades Department, AFL-CIO (hereinafter "Department"), on behalf of its affiliated International Unions, The Building and Construction Trades Council of California, The Riverside Counties and its affiliated local unions, and the Southern California Conference of Carpenters, acting on its own behalf and on behalf of its members, (hereinafter, collectively called the "Union" or "Unions"), with respect to the new construction work within the scope of this Agreement owned by The Metropolitan Water District of Southern California (hereinafter, "Metropolitan" or the "Owner") for the development of a water distribution pipeline that begins in the Devil Canyon area north of San Bernardino, California and ties into the Colorado River Aqueduct south of Lake Perris, near San Jacinto, California, then continuing in a Southwesterly direction, terminating at the junction of the Casa Loma and San Diego canals, connecting them to the Eastside Pipeline, known as the "Project."

It is understood by the parties to this Agreement that if this Agreement is acceptable to Metropolitan, it will become the policy of Metropolitan that the construction work covered by this Agreement shall be contracted exclusively to Contractors who agree to execute and be bound by the terms of this Agreement. Therefore, the Unions agree that other contractors may execute the Agreement for purposes of covering such work. The Project Contractor shall monitor the

compliance with this Agreement by all contractors, who through their execution of this Agreement, or a Letter of Assent or other document binding them to this Agreement, together with their subcontractors, shall have become bound hereto. It is understood, however, that the current contractual arrangement between Metropolitan and the Project Contractor is of limited duration, not for the length of the Project, and that should said contract not be renewed, and a new Project Contractor be designated, such Project Contractor will execute this Agreement and accept and undertake all the obligations, responsibilities and authority of the current Project Contractor for the implementation of this Agreement.

The term "Contractor" shall include all construction contractors and subcontractors of whatever tier engaged in on-site construction work within the scope of this Agreement, including the Project Contractor when it performs construction [p.2] work within the scope of this Agreement. Where specific reference to Parsons alone is intended, the term "Project Contractor" is used.

The Unions, the Project Contractor and all signatory contractors agree to abide by the terms and conditions contained in this Agreement. This Agreement represents complete understanding of the parties, and no Contractor is or will be required to sign any other agreement with a signatory union as a condition of performing work within the scope of this Agreement. No practice, understanding or agreement between a Contractor and a Union party which is not specifically set forth in this Agreement will be binding on any other party unless endorsed in writing by the Project Contractor.

The Unions agree that this Agreement will be made available to, and will fully apply to, any successful bidder for Project work who becomes a signatory hereto, without regard to whether that successful bidder performs work at other sites on either a union or a non-union basis, and without regard to whether employees of such bidder are or are not members of any union. This Agreement shall not apply to the work of any contractor which is performed at any location other than the project site as defined in this Agreement.

The use of the masculine or feminine gender or titles in this Agreement shall be construed as including both genders and not as gender limitations unless the Agreement clearly requires a different construction.

ARTICLE I

PURPOSE

The Inland Feeder Project is a multi-year, 1.1 billion dollar undertaking of The Metropolitan Water District of Southern California. The goal of this Project is to convey the added capacity of the east branch of the State Water Project into the metropolitan service area, providing the more than 15 million residents of the Southland with up to 650 million gallons of additional water a day. The Project will also replenish local groundwater supplies, improve the quality of Southern California's drinking water, and provide an important source of water for several reservoirs, including the Eastside (Domenigoni) Reservoir Project.

The timely and successful completion of this Project is critical to the ability of Metropolitan to meet the needs of the increasing population of Southern California and to prevent economic disruption and personal suffering caused by limited [p.3]water supplies. The businesses and people of Southern California have endured extensive shortages of water in recent years and it is imperative that this Project be completed in a timely fashion, making effective use of the limited financial resources of the public in general, and Metropolitan in particular, in order to provide these services. It is therefore essential that the construction work be done in an efficient, economical manner in order to secure optimum productivity and to avoid any delays in the Project.

Further, the parties recognize and understand the need to provide the basis for implementation of a cost effective workers' compensation system which, together with the cooperation and joint effort of all parties to provide the highest degree of safety for all employed on the Project, will assure improved working conditions for all employees; improved delivery of medical care for work related injuries and diseases; a reduction in the time and expense necessary to process and resolve disputes involving the payment of workers' compensation benefits; and significant savings for the Owner, its customers and the residents of its service area. It is the intention of the parties to follow the letter and the spirit of the provisions of the California Labor Code permitting the implementation of revised dispute resolution and medical care procedures for the delivery of workers' compensation benefits and medical coverage as permitted by revised Section 3201.5 of the Labor Code.

In recognition of the special needs of this Project and to maintain a spirit of harmony, labor management peace and stability during the term of this Project Labor Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise; and in recognition of such methods and procedures, the Unions agree not to engage in any strikes, slow down or interruption of work and the Contractor agrees not to engage in any lock out.

ARTICLE II
SCOPE OF AGREEMENT

This Agreement, hereinafter designated as the "Project Labor Agreement" or "Agreement" shall apply and is limited to all new construdtion as defined in Section 1 of this Article performed by those contractor(s) of whatever tier which have contracts awarded for such work, which may include the Project Contractor, on or after the effective date of this Agreement, with regard to the construction, reconstruction, rehabilitation, or any other construction-related activities necessary to the development of the Inland Feeder and related facilities, and adjacent [p.4]recreational services, all of which are hereinafter referred to as the "Project" and generally defined below.

Section 1. The Project is generally defined as and limited to:

(a) Eighteen miles of 12-foot inside diameter tunnels, running in two reaches, the first running through the Devil Canyon area near Arrowhead Springs (the San Bernardino

tunnels) and the second running south of Crafton near Redlands through the Riverside Badlands area (the Riverside tunnels);

(b) Twenty-five-and-a-half miles of 12-foot inside diameter pipeline running in two reaches through San Bernardino beginning north of Highland and running south to Crafton near Redlands (the San Bernardino Pipeline) and through the Moreno and San Jacinto Valleys near the Perris Reservoir and Colorado River Aqueduct to the San Diego Canal; and

(c) Related facilities designated by the Owner as part of the Inland Feeder Project.

It is understood by the parties that the Owner may at any time and at its sole discretion determine to build segments of the Project under this Agreement not currently proposed, or to modify or not to build any one or more of the particular segments proposed to be covered.

Section 2. Items specifically excluded from the scope of this Agreement include the following:

(a) Work of non-manual employees, including but not limited to, superintendents, supervisors, staff engineers, inspectors, quality control and quality assurance personnel, timekeepers, mail carriers, clerks, office workers, including messengers, guards, safety personnel, emergency medical and first aid technicians, and other professional, engineering, administrative, supervisory and management employees.

(b) Equipment and machinery owned or controlled and operated by the Metropolitan Water District of Southern California (the "Owner ").

(c) All off-site manufacture and handling of materials, equipment or machinery (except at dedicated lay-down or storage areas).

(d) All employees of the Project Contractor, design team or any other consultant of Metropolitan not performing manual labor with the scope of this Agreement.

[p.5](e) Any work performed on or near or leading to or on to the site of work covered by this Agreement and undertaken by state, county, city or other governmental bodies, or their contractors; or by public utilities or their contractors; and/or by the Owner or its contractors (for work which is not part of the scope of this Agreement).

(f) Off-site maintenance of leased equipment and on-site supervision of such work.

(g) Work by employees of a manufacturer or vendor necessary to maintain such manufacturer's or vendor's warranty or guarantee.

(h) Laboratory for specialty testing or inspections not ordinarily done by the signatory local unions.

(i) Non-construction support services contracted by the Owner or Project Contractor in connection with this Project.

(j) All work by employees of the Metropolitan Water District of Southern California.

Section 3(a). The Owner, the Project Contractor, and/or Contractors, as appropriate, have the absolute right to award contracts or subcontracts on this Project notwithstanding the existence or non-existence of any Agreements between such contractor and any union party provided only that such Contractor is willing, ready and able to execute and comply with this Project Labor Agreement, should such Contractor be awarded work covered by this Agreement.

(b) It is agreed that all subcontractors of a Contractor, of whatever tier, who have been awarded contracts of work covered by this Agreement on or after the effective date of this Agreement shall be required to accept and to be bound by the terms and conditions of this Project Labor Agreement, and shall evidence their acceptance by the execution of the Agreement or a Letter of Assent provided by the Project Contractor, prior to the commencement of work. A copy of the Agreement or Letter of Assent executed by the Contractor shall be available for review by the Union.

Section 4(a). The provisions of this Project Labor Agreement (including the Schedule A's, which are the local Collective Bargaining Agreements of the signatory unions having jurisdiction over the work on the Project (as may be changed from time-to-time consistent with Article XVII, Section 2) and are incorporated herein by reference) shall apply to the work covered by this Agreement, notwithstanding the provisions of any other local, [p.6]area and/or National Agreements which

may conflict with or differ from the terms of this Agreement. Where a subject covered by the provisions of this Agreement is also covered by a Schedule A, the provisions of this Agreement shall prevail. Where subject is covered by the provisions of a Schedule A and is not covered by this Agreement, the provisions of the Schedule A shall prevail.

(b) Any dispute as to the applicable source between this Agreement and any Schedule A for determining the wages, hours and working conditions of employees on the Project shall be resolved by *Howard S. Block, ESQ.*, under the procedures established in Article VII. It is understood that this Agreement, together with the referenced Schedule A's constitute a self-contained, stand-alone agreement and by the virtue of having become bound to this Project Labor Agreement the Contractor will not be obligated to sign any other local, area or national Agreement as a condition of performing work within the scope of this Agreement.

Section 5. The Agreement shall only be binding on the signatory parties hereto and shall not apply to the parents, affiliates, subsidiaries, or other ventures of any such party.

Section 6. This Agreement shall be limited to the new construction work within the scope of this Agreement for which bids have been received on and after the effective date of this Agreement, including, specifically, site preparation and related demolition work, and utilities and modifications or rehabilitation of existing facilities. Nothing contained herein shall be construed to prohibit, restrict, or interfere with the performance of any other operation, work or function which may be performed or contracted by the Owner for its own

account on the property or in and around the construction site.

Section 7. It is understood that the liability of the Contractor and the liability of the separate unions under this Agreement shall be several and not joint. The Unions agree that this Agreement does not have the effect of creating any joint employment status between or among the Owner or the Project Contractor and/or any Contractor.

Section 8. None of the provisions of this Agreement shall be construed to prohibit or restrict The Metropolitan Water District of Southern California or its employees from performing work not covered by this Agreement on or around the construction site. As areas of covered work are accepted by the Owner, the Agreement shall have no further force or effect on such items or areas except where the Contractor is directed by the Owner to engage in repairs or punch list modifications.

[p.7] **Section 9.** It is understood that the Owner, at its sole option, may terminate, delay and/or suspend any and all portions of the covered work at any time.

ARTICLE III
UNION RECOGNITION AND EMPLOYMENT

Section 1. The Contractor recognizes the Union as the sole and exclusive bargaining representative of all craft employees working on the Project within the scope of this Agreement.

Section 2. The Contractor shall have the right to determine the competency of all employees, the number of employees required and shall have the sole responsibility for selecting employees to be laid off, consistent with Article IV, Section 3 below.

Section 3. For local unions now having a job referral system as contained in Schedule A, the Contractor agrees to comply with such system and it shall be used exclusively by such Contractor, except as it may be modified by this Article. Such job referral system will be operated in a non-discriminatory manner and in full compliance with Federal, state, local laws and regulations which require equal employment opportunities and nondiscrimination, and referrals shall not be affected in any way by the rules, regulations, by-laws, constitutional provisions or any other aspects or obligations of union membership, policies or requirements. All of the foregoing hiring procedures, including related practices affecting apprenticeship and training, will be operated so as to facilitate the ability of the contractors to meet any and all equal employment opportunity/affirmative action obligations. The Contractor may reject any referral for any reason, provided the Contractor complies with Article X, Section 6(a).

Section 4. In the event that local unions are unable to fill any requisitions for employees within forty-eight (48) hours after such requisition is made by the Contractor (Saturdays, Sundays, and holidays excepted), the Contractor may employ applicants from any other available source. The Contractor shall inform the Union of any applicants hired from other sources.

Section 5. The local unions shall not knowingly refer an employee currently employed by any Contractor working under this Agreement to any other Contractor.

Section 6. The local unions will exert their utmost efforts to recruit and refer sufficient numbers of skilled craft workers to fulfill the manpower requirements of the Contractor, including specific employment obligations to which the Contractor may be [p.8]legally obligated. The parties to this Agreement support the development of increased numbers of skilled construction workers from the residents of the area of the Project to meet the needs of this Project and the requirements of the industry generally. Toward that end, the unions agree to encourage the referral and utilization, to the extent permitted by law and the hiring hall procedures, of qualified residents as journeymen, apprentices and trainees on this Project and entrance into such apprenticeship and training programs as may be operated by the signatory local unions.

Section 7. In the event that a signatory local union does not have a job referral system as set forth in Section 3 above, the Contractor shall give the union equal opportunity to refer applicants. The Contractor shall notify the union of employees hired from any source other than referral by the union.

Section 8. In the event the local unions either fail, or are unable, to refer qualified minority or female applicants to meet the affirmative action commitments to which the Contractor is legally bound by contract or law, the Contractor may employ qualified minority or female applicants from any other available source.

Section 9. No employee covered by this Agreement shall be required to join any union as a condition of being employed, or remaining employed, on the Project; provided, however, that an employee who is a member of the referring union at the time of referral shall maintain that membership in good standing while employed under the Agreement. All employees shall, however, be required to comply with the union security provisions of the applicable Schedule A for the period during which they are performing on-site Project work to the extent, as required by law, of rendering payment of the applicable monthly dues and all fees uniformly required for union membership in the local union which is signatory to this Agreement, consistent with the clarification issued by the Project Contractor under the Eastside Reservoir Project Labor Agreement on July 26, 1996.

Section 10. The parties recognize the Owner's commitment to provide opportunities to participate on the Project to minority and women owned business enterprises as well as other enterprises which may not have previously had a relationship with the unions signatory to this Agreement. To ensure that such enterprises will have an opportunity to employ their "core" employees on this Project, the parties agree that in those situations where a Contractor not a party to the current collective bargaining agreement with the signatory union having jurisdiction over the affected work is a successful bidder, that Contractor may request by name, and the local will honor, referral of persons who have [p.9]applied to the local union for Project work and who meet the following qualifications:

(1) possess any license required by state or federal law for the Project work to be performed;

(2) have worked a total of at least 2,000 hours in the construction craft during the prior 3 years;

(3) were on the Contractor's active payroll for at least 90 out of the 180 calendar days prior to the contract award;

(4) have the ability to perform safely the basic functions of the applicable trade.

The Union will refer to such Contractor one employee from the hiring hall out-of-work list for the affected trade or craft, and will then refer one of such Contractor's "core" employees and shall repeat the process as follows: one from the hiring hall and one "core" employee; two from the hiring hall and one "core" employee; two from the hiring hall and one "core" employee; one from the hiring hall and one "core" employee; and two from the hiring hall and one "core" employee, until such contractor's crew requirements are met or until such contractor has hired six such "core" employees, whichever occurs first. Subsequently, such Contractor may employ "core" employees to maintain a 15% " core" employee ratio up to a maximum of 75 employees, per contractor by craft. Thereafter, all additional employees in the affected trade or craft shall be hired exclusively from the hiring hall out-of-work list.

Section 11. Except as provided in Article IV, Section 3, individual seniority should not be recognized or applied to

employees working on the Project.

Section 12. The selection of craft foremen and/or general foremen shall be the responsibility of the Contractor. All foremen shall take orders exclusively from the designated contractor representatives. Craft foremen shall be designated as working foremen at the request of the Contractor.

Section 13. To assist the Union parties in the administration of the Agreement, the Contractor shall deduct in each pay period from the wages of each employee who authorizes it in writing pursuant to a lawful wage assignment authorization, four cents ($.04) per hour for each hour worked or paid and shall remit each month two cents ($.02) per hour so deducted to the Building and Construction Trades Council of California and the remaining two [p.10] cents ($.02) per hour so deducted to the San Bernardino and Riverside Counties Building and Construction Trades Council.

ARTICLE IV
UNION REPRESENTATION AND STEWARDS

Section 1. Authorized representatives of the Union shall have access to the Project, provided that they do not interfere with the work of the employees and further provided that such representatives fully comply with posted visitor and security and safety rules of the Project. It is understood that because of the geographical scope of the Project, and the type of work being undertaken on the Project site, visitors may be limited to certain times, or areas, or to being accompanied at all times while on the Project site; with this in mind, however, the Contractor recognizes the right of access set forth in this

Section and such will not be unreasonably withheld from an authorized representative of the Union.

Section 2(a). Each signatory local union shall have the right to dispatch a working journeyman as a steward for each shift, and shall notify the Contractor in writing of the identity of the designated steward or stewards prior to the assumption of such person's duties as steward, Such designated steward or stewards shall not exercise any supervisory functions. There will be no non-working steward. Stewards will receive the regular rate of their respective crafts.

(b) In addition to his/her work as an employee, the steward shall have the right to receive, but not solicit, complaints or grievances and to discuss and assist in the adjustment of the same with the employee's appropriate supervisor. Each steward shall be concerned with the employees of the steward's Contractor and if applicable, subcontractors, and not with the employees of any other Contractor. The Contractor will not discriminate against the steward in the proper performance of his union duties.

(c) When a contractor has multiple, non-contiguous work locations on the site, he may request, and the union shall appoint such additional working stewards as he requests to provide independent coverage of one or more such locations. In such cases as a steward may not service more than one work location without the approval of the contractor.

(d) The stewards shall not have the right to determine when overtime shall be worked or who shall work overtime.

[p.11]**Section 3.** The Contractor agrees to notify the appropriate union twenty-four (24) hours prior to the layoff of a steward, except in the case of disciplinary discharge for just cause. If a steward is protected against such layoff by the provisions of any Schedule A, such provisions shall be recognized to the extent that the steward possesses the necessary qualifications to perform the work remaining. In any case in which a steward is discharged or disciplined for just cause, the appropriate union shall be notified immediately by the Contractor.

Section 4. Personnel of the Metropolitan will be working in close proximity to the construction activities. The union agrees that the union representatives, stewards and individual workers will not interfere with Metropolitan personnel, or with personnel employed by any other employer not a party to this Agreement.

ARTICLE V
MANAGEMENT'S RIGHTS

Section 1. The Contractor retains the full and exclusive authority for the management of its operations. Except as expressly limited by other provisions of this Agreement, the Contractor retains the right to direct the workforce, including the hiring, promotion, transfer, layoff, discipline or discharge for just cause of its employees; the selection of foremen; the assignment and schedule of work; the promulgation of reasonable work rules; and, the requirement of overtime work, the determination of when it will be worked and the number and identity of employees engaged in such work. No rules, customs, or practices which limit or restrict

productivity, efficiency or the individual and/or joint working efforts of employees shall be permitted or observed. The Contractor may utilize any methods or techniques of construction.

Section 2. There shall be no limitation or restriction by a signatory union upon a Contractor's choice of materials or design, nor, regardless of source or location, upon the full use and utilization of equipment, machinery, packaging, pre-cast, pre-fabricated, pre-finish, or pre-assembled materials, tools, or other labor saving devices. The on-site installation or application of all items shall be performed by the craft having jurisdiction over such work; provided, however, it is recognized that installation of specialty items which may be furnished by the Owner may be performed by employees employed under this Agreement with the participation of other personnel in a supervisory role, or, in limited circumstances requiring special knowledge of the particular item(s), may be performed by employees of the vendor or other companies where employees working under this Agreement lack the required skills.

[p. 12] **Section 3.** The use of new technology, equipment, machinery, tools and/or labor saving devices and methods of performing work may be initiated by the Contractor from time-to-time during the Project. The Union agrees that it will not in any way restrict the implementation of such new devices or work methods. If there is any disagreement between the contractor and the union concerning the manner or implementation of such device or method of work, the implementation shall proceed as directed by the Contractor, and the Union shall have the right to grieve and/or arbitrate

the dispute as set forth in Article VII of this Agreement....

APPENDIX H

SOUTHERN CALIFORNIA

MASTER LABOR AGREEMENT

Between

The International Union of Operating Engineers

and the

Southern California Contractors Association, Inc.
Local 12

July 1, 1998
through
June 30, 2001

STIPULATED EXHIBIT 4

[p.106]M. Crews:

1. Crew sizes shall be determined by the individual Contractor except as outlined in Appendix A through D and below:

(a) Derrick Barges - Crews on derrick barges shall consist of Engineer-Operator, Engineer-Oiler and Deck Engineer.

(b) An Engineer-Operator and Engineer-Oiler or Fireman shall constitute a crew and shall be so present on the following equipment at all times: Power shovels, draglines, clam-shells, backhoe (excluding Ford Ferguson, Sherman and similar types), all cranes (except as excluded elsewhere in this Agreement) Whirleys or other types, excluding tower cranes, mucking machines over 1/4 cu. yd. capacity, trenching machines (except Ford Ferguson, jeeps and similar types), pile drivers, derrick barges, drill rigs (rotary churn or cable tool), and paving mixers. The Engineer-Oiler or Fireman shall be under the direct supervision of the Engineer-Operator. An Engineer-Operator or Journeyman-trainee may [p.107]be utilized instead of Oiler or Fireman....

APPENDIX I

In the Matter of Arbitration	)
Between	)
SHANK/BALFOUR BEATTY	)
	)
and	)
	)
INTERNATIONAL UNION OF	)
OPERATING ENGINEERS,	)
LOCAL UNION NO. 12	)
	)

ARBITRATION OPINION AND AWARD

Issue: Manning Requirement - Engineer Oiler

Impartial Arbitrator Howard S. Block, Esq.

Hearing Held
April 7, 1999
San Bernardino Hilton
San Bernardino, California

Appearances

For S/BB: M. L. Shank
Managing Partner
Shank/Balfour Beatty
P. O. Box 129

Highland, CA 92346

For the Union: David P. Koppelman, Counsel
I.U.O.E. , Local 12
P. O. Box 7109
Pasadena, CA 91109-7209

STIPULATED EXHIBIT 7

SUMMARY OF THE CASE

Shank/Balfour Beatty (S/BB) is one of many contractors performing work on the Inland Feeder Project, a major water distribution pipeline being developed for the Metropolitan Water District of Southern California. This dispute arose in connection with work being performed on the Arrowhead East Tunnel.

S/BB uses large cranes on the Inland Feeder Project -- a Manitowac 4100 crane rated at 150 tons and a Lorraine crane rated at 90 tons. The Union dispatched both a Crane Operator and an Engineer-Oiler to the Project but claims that the Oiler was assigned to other work in alleged violation of the Master Labor Agreement (MLA).

Brad Nolan, a Union Business Representative, offered the following uncontradicted testimony as regards the alleged violation in response to the following questions on direct examination (Tr.10:23-11:13):

> "Q ... Based on your personal observations in servicing the job, what have you observed Mr. Shank's practices to be -- I should say

Shank/Balfour Beatty's practices to be in terms of manning th is equipment?

A Well, what they have is, they service the tunnel with mainly their 90-ton Lorraine crane, and we dispatch an operator to that, and also we dispatch an oiler. Both the oiler we dispatch out there, what they do is, they take him off the crane and they move him over to what they call a rollover machine.

As locomotives come out, it grabs onto the cars and rolls them over and dumps them out, and then the locomotive pulls ahead and dumps the dirt from the tunnel onto conveyors. So our oiler is not oiling on that crane. He's over running another piece of equipment on the project."

Mr. Nolan summarized the Union's position as follows (Tr.12:16-21):

"Q So what is it that you allege to be the violation in this case?

A The violation is that the oiler is doing other work than oiling on the crane. He's not identified with that crane at all times, signaling and rigging. That's the oiler's job for the crane."

S/BB contends that the Project Labor Agreement (PLA) recognizes its right to operate efficiently and does not

require more workers than are necessary to perform the work. Thus, at those times when a muck train comes out of the tunnel and S/BB divides up its four person portal crew so that the Crane Oiler operates the car dumping mechanism, the Company is using the joint working efforts of employees to assure that the work is done most efficiently, with the least number of persons, as prescribed by the PLA. S/BB charges that the by complaining that the Company has divided up its portal crew so that the Crane Oiler operates the car dumping mechanism, the Union is in defiance of the parties stated agreement by seeking to implement a rule, custom, or practice that would limit or restrict productivity, efficiency and the joint working efforts of employee. Moreover, charges S/BB, by demanding that it hire another employee that it does not need, the Union is in violation of the parties stated agreement in requiring more workers that are necessary to perform the work.

When this dispute could not be resolved between the parties it was referred to arbitration in accordance with the provisions of Article II, Section 4(b) of the PLA (Union Exhibit 1). S/BB raised an issue of arbitrability that was vigorously opposed by both the Project Contractor (Parsons Constructors Inc.) and the Union. Nevertheless, S/BB "... agreed that the arbitrator may decide the case upon its merits without addressing the issue of arbitrability." (Post-Hearing Brief p.1). Accordingly, a hearing was held before the Arbitrator on April 7, 1999 at which time all parties concerned were given a full opportunity to present evidence and argument bearing on the stipulated issues. Each party concluded its case with the filing of a Post-Hearing Brief.

ISSUES

After some discussion the parties mutually to agreed to the following stipulated issues (Tr.5:10-17):

1. Is Shank/Balfour Beatty in violation of the Agreement by not having Oilers for both its Lorraine Crane and the Manitowac Crane?
2. If so, what is the appropriate remedy?

OPINION OF THE ARBITRATOR

The facts of this case are undisputed. S/BB cites its right to operate efficiently and to decide the manpower necessary to perform the work. The Union relies upon the manning requirements set forth in the MLA. Sharply disputed is how these conflicting contentions should be interpreted and applied to the contract language.

The Union asserts that Article XVI, captioned "WORKING RULES," requires that, for cranes of the type used by S/BB on the Inland Feeder Project "An Engineer-Operator and Engineer-Oiler or Fireman shall constitute a crew and shall be so present ... *at all times*." (Emphasis in Union's Post-Hearing Brief). In addition, Appendix B of the MLA expressly provides: "Oiler required" for both of these cranes (MLA pp. 194-195).

Both parties have relied upon a clarifying letter dated October 1, 1996 from Mr. D'Antuono, President of Parsons Constructors Inc. to Mr. Waggoner, Business Manager of the

Union, which reads in relevant part as follows (PLA, immediately following the signature page):

> SUBJECT: MWD Inland Feeder Project Labor Agreement
>
> This letter will confirm our understanding concerning the interpretation and application of Article III, Section 2, and Article V, Section I, of the MWD Inland Feeder Project Labor Agreement as those sections might affect the equipment manning provisions of the Operating Engineers local collective bargaining agreement. In the negotiations the parties agreed in Article III, Section 2, that the Contractor has the right to determine the number of employees it will hire. You have requested that we clarify, in light of this provision, the effect of the Project Agreement supercession clause, Article II, Section 4, upon the various manning requirements contained in the Operating Engineers local agreement.
>
> As a result of our discussions with you, we have confirmed our mutual interpretation that the equipment manning requirements of the OE local agreement are not superseded and therefore they would apply to set the manning levels for the equipment falling within the jurisdiction of the Operating Engineers, consistent with other provisions of the Project Labor Agreement. Article III, Section 2, does not purport to regulate the classifications the

> Contractor employs on particular equipment; it addresses only the number required. Accordingly, the classifications and the functions they perform as set out in the Schedule A are unaffected by this Section.
>
> The Parties also agree in the Project Labor Agreement that, 'No rules, customs, or practices which limit or restrict productivity, efficiency, or the individual and/or joint working efforts of employees shall be permitted or observed.' Article V, Section I. This provision, coupled with the right to determine the number of employees hired, is vital to the Contractor's right and responsibility to direct the performance of the work, and does not require more workers than are necessary to perform the work."

The Union relies upon the first sentence in the second paragraph which confirms "... our mutual interprefiation that the equipment manning requirements of the OE local agreement are not superceded [by the Project Agreement supercession clause] and therefore they would apply to set the manning levels for the equipment falling within the jurisdiction of the Operating Engineers...".

For its part, S/BB relies upon the language in the third paragraph as "the very essence of the PLA," quoting Article V, Section 1 which states:

> "'No rules, customs, or practices which limit or restrict productivity, efficiency, or the

> individual and/or joint working efforts of employees shall be permitted or observed,' and that this provision coupled with the right to determine the number of employees hired, is vital to the Contractor's right and responsibility to direct the performance of the work, *and does not require more workers than are necessary to perform the work*.'"(Emphasis in S/BB's Post Hearing Brief).

In the Arbitrator's opinion, the conflicting position of the parties can be resolved by a familiar rule of contract interpretation. When, as here, there is a conflict between specific language and general language in an agreement, the canons of contract construction provide that the specific language will govern. The reason is that specific language is considered a more reliable basis for determining the intent of the parties.

Applying that rule to the facts of the instant case, the MLA language cited above which mandates that cranes of these types be manned "at all times" by a crew consisting of an Engineer-Operator and Engineer-Oiler or Fireman is controlling over the more general language which recognizes the Company's right to operate efficiently and decide its manpower requirements. Therefore, the Arbitrator concludes that S/BB violated the MLA by not assigning an Oiler to these cranes.

That brings us to the issue of an appropriate remedy. The remedy sought by the Union is twofold: (1) the Union requests an order directing S/BB to hire an additional Engineer-Oiler and to identify that employee with its cranes

at all times; and (2) a "make whole" remedy in the amount of wages and benefits that would have been paid to a Union member in the appropriate classification.

S/BB has opposed both remedies on grounds that the PLA is silent as to penalties for any kind of violation whereas the MLA covers penalties for several kinds of violations but provides no penalty at all for a manning violation.

The Arbitrator simply cannot agree that he is without jurisdiction to prescribe an appropriate remedy when a contract violation has been found. An Arbitrator's remedial authority has been fairly well settled since the landmark 1960 *Enterprise* decision* by the U S. Supreme Court when it discussed the remedy power of arbitrators:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

Even more directly in point, Article VII, captioned "DISPUTES AND GRIEVANCES," Section 3 contemplates

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* *United Steelworkers v. Enterprise Wheel & Car Corp.*, 80 S. Ct. 1358, 1361 (1960).

a remedy by its limiting provisions which state:

> "No adjustment or decision may provide retroactivity exceeding sixty (60) days prior to the date of the filing of a written grievance."

The foregoing provision would be meaningless if the Arbitrator's sole authority were to "provide the prescribed manning," as S/BB argues in its Post-Hearing Brief (p.4:4-10).

Turning, then, to the remedy issue the Union is clearly entitled to an Award ordering S/BB to comply with the contractual manning requirements in the future. The Arbitrator is less convinced about granting the Union's requested "make whole" remedy on grounds that it is not at all clear from the record of this proceeding that any Union member sustained a loss of wages. After pondering the matter at length, the Arbitrator has decided that the appropriate decision based upon the facts of this case is to deny the "make whole" request without prejudice to any future claim.

AWARD

Based upon a careful consideration of all of the evidence and argument, it is the decision of the Arbitrator that:

1. Shank/Balfour Beatty violated the Agreement by not having Oilers for both its Lorraine Crane and the Manitowac Crane.

2. Shank/Balfour Beatty is ordered to comply with all contractual manning requirements in the future including, but not limited to, the hiring of Oilers for both its Lorraine and Manitowac Cranes.

3. The Union's requested "make whole" order is denied without prejudice to any future claims.

/s/_____
Howard S. Block
Impartial Arbitrator

August 10, 1999
Tustin, California

APPENDIX J

TITLE 29. LABOR

CHAPTER 7. LABOR-MANAGEMENT RELATIONS

CONCILIATION OF LABOR DISPUTES; NATIONAL EMERGENCIES

61 Stat. 153, 29 U.S.C. §173 (2001)

§173. Functions of the Service

(a) Settlements of disputes through conciliation and mediation.

It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes.

The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate

commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) Settlement of disputes by other means upon failure of concilation.

If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act [29 USCS §§141-144, 151-158, 159-167, 171-183, 185-187, 191-197, 557].

(d) Use of concilation and mediation services as last resort.

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(e) Encouragement and support of establishment and operation of joint labor management activities conducted by committees.

The Service is authorized and directed to encourage and support the establishment and operation of joint labor management activities conducted by plant, area, and industrywide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with the provisions of section 205A [29 USCS §175a].

(f) Use of alternative means of dispute resolution procedures; assignment of neutrals and arbitrators.

The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5, United States Code [5 USCS §§571 et seq.]. Functions performed by the Service may include assisting parties to disputes related to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 573 of title 5, United States Code, may be assigned to act as neutrals. The Service shall consult with the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code, in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection. HISTORY: (June 23, 1947, ch 120, Title II, §203, 61 Stat. 153; Oct. 27, 1978, P.L. 95-524, § 6(c)(1), 92 Stat. 2020; Nov. 15, 1990, P.L. 101-552, §7, 104 Stat. 2746; Aug. 26, 1992, P.L. 102-354, §5(b)(5),

106 Stat. 946.) (As amended Oct. 19, 1996, P.L. 104-320, §4(c), 110 Stat. 3871.)

APPENDIX K

TITLE 29. LABOR

CHAPTER 7. LABOR-MANAGEMENT RELATIONS

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

61 Stat. 156, 29 U.S.C. §185 (2001)

§185. Suits by and against labor organizations

(a) Venue, amount, and citizenship.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United

States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction.

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process.

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency.

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. HISTORY: (June 23, 1947, ch 120, Title III, §301, 61 Stat. 156.)

Supreme Court, U.S.
FILED
APR 26 2002

No. 01-1426

IN THE

Supreme Court of the United States

SHANK/BALFOUR BEATTY,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 12,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent International Union of Operating Engineers, Local Union No. 12 is not a corporation or a publicly held company.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent International Union of Operating Engineers, Local Union No. 12 respectfully requests the petition for writ of certiorari sought in this matter be denied.

STATEMENT OF THE CASE

The petition before this Court fails to advance any compelling reason for granting certiorari. The Ninth Circuit did not create a circuit split when it deferred to the arbitrator's interpretation of ambiguous provisions in the parties' collective bargaining agreement, after concluding that the arbitrator's opinion offers a plausible interpretation of the two contracts at issue. Instead, the Ninth Circuit's rejection of petitioner's attempt to open a back door to judicial review of the merits of the arbitrator's award was grounded in the well-

established and long standing precedents of this Court, emphasizing the broadest possible judicial deference to arbitration awards in order to effectuate the federal labor policy of settling disputes by arbitration.

A. The Collective Bargaining Agreement

Petitioner is one of many contractors performing work on the Inland Feeder Project, a major water distribution pipeline being developed for the Metropolitan Water District of Southern California. The Inland Feeder Project is a multi-year, 1.1 billion-dollar undertaking of the MWD, with the stated goal of conveying added capacity of the east branch of the State Water Project into the metropolitan service area, thereby providing the more than 15 million residents of Southern California with up to 650 million gallons of additional water per day. When completed, the Inland Feeder Project will also replenish local groundwater supplies, improve the quality of Southern California's drinking water, and provide an important source of water for several reservoirs. (Pet. App. at 30a).

Parsons Constructors, Inc. ("Parsons") is the Project Contractor. In 1996, Parsons entered into a Project Labor Agreement with the Building and Construction Trades Department, AFL-CIO ("BCTD") with respect to work performed on the development of a water distribution pipeline that begins in the Devil Canyon area north of San Bernardino and ties into the Colorado River Aqueduct south of Lake Perris, near San Jacinto, eventually terminating at the junction of Casa Loma and San Diego Canals, connecting them to the Eastside Pipeline (hereinafter referred to as "The Project"). (Pet. App. at 28a). It is the policy of the Metropolitan Water District that the construction work covered by the Project Labor Agreement ("PLA") shall be contracted exclusively to Contractors who agree to execute and be bound by its terms

(Pet. App. at 28a). In February 1997, petitioner signed a Letter of Assent agreeing to be bound to the terms and conditions of the PLA. (Pet. App. at 22a).

Fourteen international unions as well as a number of their affiliated locals, including respondent, are signatory to the PLA. Recognizing that each union has master labor agreements with various employer associations governing the unique terms and conditions of employment of their respective crafts, the PLA incorporates by reference certain provisions of these individual collective bargaining agreements, collectively referring to them as "Schedule A." The Master Labor Agreement between Local 12 and the Southern California Contractors Association, Inc. ("MLA") is the individual collective bargaining agreement, or Schedule A, relevant to the dispute that was the subject of arbitration. (Pet. App. at 23a and 47a).

In addition to incorporating the MLA, the PLA also contains an express agreement between Local 12 and Parsons regarding the manning levels of equipment in Local 12's jurisdiction. The agreement, contained in a letter from Parsons to Local 12 dated October 1, 1996, is appended to and made a part of the PLA, and confirms that the equipment manning requirements of the MLA are not superceded by the PLA.[1] Petitioner does not deny it is bound to this express provision of the PLA. Rather, petitioner ignores its very existence.

Petitioner correctly notes that Parsons and BCTD anticipated potential disagreements over whether and to what extent to apply provisions of the various local union collective bargaining agreements to work covered by the PLA, and agreed that such disputes shall be referred to Arbitrator Howard S. Block for resolution under the grievance and

---

[1] The Letter of Understanding is appended hereto at 1a.

arbitration procedure of the PLA. (Pet. App. at 36a). The award petitioners seek to overturn was rendered pursuant to this procedure.

B. The Labor Dispute and the Arbitration Award.

In 1998, a dispute arose between petitioner and Local 12 over the application and interpretation of the PLA regarding the number and classification of employees required to be employed to perform certain work on the Project (referred to by the parties as "manning provisions"). (Pet. App. at 23a and 26a). Specifically, Local 12 charged petitioner with violating Article XVI Section M of Schedule A of the MLA, which is incorporated by reference in the PLA, by failing to assign an Engineer Oiler to work on its cranes. When they were unable to resolve the dispute over manning provisions, the grievance proceeded to arbitration before Arbitrator Block. (Pet. App. at 24a).

On August 10, 1999, Arbitrator Block issued his Opinion and Award ("Award"), in which he held that petitioner had violated the agreement by not having Oilers for both cranes, finding that the specific language of the MLA mandating that cranes be manned "at all times" by a crew consisting of an Engineer-Oiler and an Engineer-Oiler or Fireman governed the manning of the cranes in question. Arbitrator Block considered and rejected petitioner's contention that the general management's rights clause in Article V, Section 1 of the PLA, together with the third paragraph of the October 1, 1996 Letter of Understanding between respondent and Parsons permitted petitioner to ignore the contractual manning provisions of the MLA. (Pet. App. at 49a-59a).

As a remedy for the contract violation, Arbitrator Block ordered petitioner to comply with all contractual manning requirements in the future including, but not limited to, the hiring of Oilers for both its Lorraine and Manitowac Cranes.

He denied without prejudice the Union's request for a "make whole" remedy of lost wages to Engineer-Oilers who should have been assigned to the cranes.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Article II, Section 4(a) of the PLA requires the arbitrator to defer to the PLA when the grievance concerns a subject covered by conflicting provisions of the PLA and the MLA. Petitioner argues that the arbitrator, the district court and the Ninth Circuit all conceded that the PLA and MLA address the manning requirements for the cranes operated by petitioner, and therefore, the plain language of Article II, which petitioner refers to as "the supersession clause," deprived the arbitrator of the jurisdiction to apply the terms of the MLA to the dispute. (Pet. at 12.) The Ninth Circuit was required to vacate Arbitrator Block's award, concludes petitioner, because he dispensed his own brand of industrial justice by giving consideration to the terms of the MLA.

This assessment of the record below is so oversimplified as to be misleading. In fact, the district court recognized that Arbitrator Block's opinion was based on his conclusion that the MLA's manning requirements were incorporated into and made a part of the PLA by virtue of the Letter of Understanding between Parsons and Local 12:

> ". . . Block appears to agree with Local 12 that the letter of understanding incorporated the MLA into the PLA, *forming one contract.* Because Block could have easily determined that the MLA was incorporated into the PLA through the letter of understanding, Block's determination is a reasonable interpretation of the two collective bargaining agreements." (Emphasis supplied.)

Relying chiefly on this Court's opinion in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593 (1960), the district court concluded that Block followed the essence of the PLA, and therefore did not dispense his own brand of industrial justice. (Pet. App. at 13a.)

The Ninth Circuit agreed, dismissing petitioner's argument that the language of the PLA is so plain and unambiguous that the arbitrator was required to give the management's rights clause superceding effect. Indeed, the Ninth Circuit recognized that petitioner was attempting to "open a back door to judicial review of the merits of an arbitration award," the very thing this Court cautioned against in *Enterprise Wheel*. (Pet. App. at 2a.)

Petitioner's insistence on completely ignoring the Letter of Understanding, and its significance both to Arbitrator Block's award as well as to the decision below, permits it to engage in a facile analysis of all other authorities. Thus, petitioner pedantically recites this Court's observation in *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987), that an arbitrator cannot ignore the plain language of the contract, and suggests that this is precisely what Arbitrator Block did in refusing to defer to the PLA's management's rights clause. In truth, Arbitrator Block considered and interpreted the plain language of the *entire* agreement, *including* the Letter of Understanding between Parsons and Local 12, and this is the true cause of petitioner's dissatisfaction with the award.

Recently, in *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000), this Court reiterated "if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Id.* at 62 (quoting *Misco*, *supra*, at 38). "When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not

provide a basis for a reviewing court to refuse to enforce the award." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001), (quoting *Misco, supra,* at 39).

Contrary to petitioner's assertion, the decision below did not depart from these authorities. Instead, referring to its decision in *Hawaii Teamsters & Allied Workers Union v. United Parcel Service*, 241 F.3d 1177 (9th Cir. 2001), the Ninth Circuit emphasized: "As bears repeating, 'so far as the arbitrator's decision *concerns* construction of the contract'—as it does here—'the courts have no business overruling him because their interpretation of the contract is different from his.'" *Id.* at 1183 (quoting *Enterprise Wheel, supra*, at 599). Significantly, the *Hawaii Teamsters* case was one in which the union suggested the same narrow approach to contract interpretation as advanced in the petition. Looking beyond the union's formulaic attack on the arbitrator's award, the Ninth Circuit took great care to insure that the mere recitation of the familiar phrases, "draws its essence from the collective bargaining agreement" and "dispensed his own brand of industrial justice," did not open a back door to judicial review of the merits of an award:

> Local 996's position would result in the exception swallowing the rule; any time an arbitrator arrived at a result that a party believes to be the result of faulty contract interpretation, it could obtain judicial review of the merits by phrasing its disagreement with the arbitrator's award as a complaint that he disregarded the contract and 'dispensed his own brand of industrial justice.' But the fact that an arbitrator arguably misinterpreted a contract does not mean he did not engage in the act of interpreting it.

Id. at 1183.

The Ninth Circuit characterized the union's position in *Hawaii Teamsters* as a "straightjacket approach to contract interpretation." *Id.* at 1182. This is the same approach

adopted by petitioner to persuade the Court that the petition presents an opportunity to provide significant guidance on what standards federal courts should use in assessing whether an arbitrator has dispensed his own brand of industrial justice. (Pet. at 14.) In truth, petitioner invites a merits-based review of the arbitration award, something this Court has consistently declined to do for over forty years. However, even if the record offered more convincing evidence that Arbitrator Block completely misinterpreted the Letter of Understanding—and it most certainly does not—such an error would not warrant the drastic departure from this Court's established precedent: "Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors *or misinterprets the parties' agreement*." *Garvey*, 532 U.S. at 509.

II. THE NINTH CIRCUIT DECISION DOES NOT CREATE A CIRCUIT SPLIT

Again, petitioner's complete disregard of the Letter of Understanding poisons its analysis of decisions in the First, Fourth and Sixth Circuits, and leads it to the erroneous conclusion that the decision below establishes a circuit split. It does not.

First, the so-called "supersession clause" of the PLA does not, as petitioner argues, render the PLA's provisions unambiguous. Significantly, the "supersession clause" could not determine the meaning of the Letter of Understanding, and petitioner has never argued otherwise. This question of what effect the Letter of Understanding was to be given was specifically before the arbitrator, with the parties advancing their different interpretations of that agreement. (Pet. App. at 53a–56a.) As the district court noted, Arbitrator Block "appear[ed] to agree with Local 12 that the letter of understanding incorporated the MLA into the PLA, forming one contract." (Pet. App. at 13a.) The "supersession clause"

becomes irrelevant with this finding, because in effect, the PLA itself contains the manning requirements, which Arbitrator Block concluded had been violated by the petitioner.

Second, the cases cited by petitioner are distinguishable, and thus not in direct conflict with the Ninth Circuit. In *Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Bd.*, 724 F.2d 1217 (6th Cir. 1984), an employee was discharged for insubordination, after repeatedly refusing to comply with his supervisor's instruction to perform detailed inventories on a regular basis. In addition to a broad, general management's rights clause, the collective bargaining agreement contained a provision specifically empowering the employer to discharge employees "without redress" for insubordination. The arbitrator found that the employee had in fact been insubordinate. Despite the specific language of the collective bargaining agreement, however, he modified the discipline imposed by the employer. The Sixth Circuit vacated the award, because the agreement unambiguously allocated the power to discharge for insubordination solely to the Company. *Morgan Services, supra*, 724 F.2d at 1222.

Arbitrator Block's conclusion that the MLA's manning provisions were incorporated into the PLA by virtue of the Letter of Understanding, gave him the authority to determine whether the management's rights clause or the incorporated manning requirements controlled the outcome of the grievance. To the extent these provisions were ambiguous, his application of traditional principles of contract interpretation, preferring the specific over the general, were correctly utilized. Again, both provisions were, in effect, a part of the PLA, and therefore the "supersession clause" had no relevance. Arbitrator Block did not fashion a remedy where the parties agreed none existed. He interpreted ambiguous provisions in a collective bargaining agreement, in a manner that gave meaning to the parties' stated intent.

Similarly, in *United States Postal Serv. v. American Postal Workers Union*, 204 F.3d 523 (4th Cir. 2000), the arbitrator fashioned a remedy where none existed when he ordered a hearing on the merits of a grievance protesting the termination of a probationary employee, where the collective bargaining agreement expressly stated that employees terminated during their probationary period "shall not be permitted access to the grievance and arbitration procedure. . . ." *Id.* at 525. The Fourth Circuit vacated the award, concluding that arbitration is a matter of contract, and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 528 (quoting *United Steelworkers of America v. Warrior and Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

The distinction between Arbitrator Block's award and the award of the arbitrator in *United States Postal Serv.* is self-evident. It is only by disregarding the existence of the Letter of Understanding that petitioner can even venture the suggestion that Arbitrator Block asserted authority over a non-arbitrable dispute. Nothing in the record or decision below supports the contention that the Ninth Circuit's decision conflicts with the Fourth Circuit's in any meaningful way.

Finally, in *Georgia-Pacific Corp. v. Local 27, United Paperworkers International Union*, 864 F.2d 940 (1st Cir. 1988), the arbitrator found that the grievant had engaged in an act of dishonesty, and further, that the collective bargaining agreement was unambiguous on its face, permitting the employer to discharge immediately for dishonesty. Despite these two findings, the arbitrator reinstated the grievant, reasoning that while he lacked the authority to mitigate the discharge penalty because of the circumstances of the offense, he nonetheless possessed "normal authority" to mitigate on the basis of the grievant's overall employment record.

The First Circuit vacated the award, calling the arbitrator's reasoning "reminiscent of an *Alice in Wonderland* fantasy." *Georgia Pacific Corp., supra*, 864 F.2d at 945.

Arbitrator Block's findings, far from evoking images of Alice's fantastic adventures, are consistent with his award, and are a plausible interpretation of the agreements. Petitioner's dispute, however, is with the very fact that Arbitrator Block interpreted the agreements. With respect to an arbitrator's discretion to interpret ambiguous provisions in a collective bargaining agreement, however, the First Circuit noted:

> We do not mean to suggest that an arbitrator enjoys no discretion in interpreting the terms of a collective bargaining agreement. Although the collective bargaining agreement in this case authorizes immediate discharge for dishonesty, it does not define that term. It is thus up to an arbitrator to decide whether a given pattern of conduct amounts to dishonesty.

Id. at 945, fn. 2.

The perceived circuit split dissolves with the recognition that Arbitrator Block's undisputed authority included giving meaning and effect to the Letter of Understanding. His authority was not as limited as petitioner disingenuously suggests. Petitioner bargained for—and received—the arbitrator's construction of the entire PLA, including the Letter of Understanding. The cases presented to the First, Fourth and Sixth Circuits contained entirely dissimilar facts.

CONCLUSION

For all of the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent International Union of Operating Engineers, Local Union No. 12

APPENDIX

APPENDIX

PARSONS CONSTRUCTORS INC.
100 West Walnut Street
Pasadena, California 91124
(818) 440-3000 • (818) 440-2516

October 1, 1996

Mr. William Waggoner
Business Manager
Operating Engineers Local 12
150 East Corson Street
Pasadena, California 91103

Dear Mr. Waggoner:

SUBJECT: MWD Inland Feeder Project Labor Agreement

This letter will confirm our understanding concerning the interpretation and application of Article III, Section 2, and Article V, Section 1, of the MWD Inland Feeder Project Labor Agreement as those sections might affect the equipment manning provisions of the Operating Engineers local collective bargaining agreement. In the negotiations, the parties agreed in Article III, Section 2, that the Contractor has the right to determine the number of employees it will hire. You have requested that we clarify, in light of this provision, the effect of the Project Agreement supercession clause, Article II, Section 4, upon the various manning requirements contained in the Operating Engineers local agreement.

As a result of our discussions with you, we have confirmed our mutual interpretation that the equipment manning requirements of the OE local agreement are not superseded and therefore they would apply to set the manning levels for the equipment falling within the jurisdiction of the Operating Engineers, consistent with other provisions of the Project Labor Agreement. Article III, Section 2, does not purport to regulate the classifications the Contractor employs on particular equipment; it addresses only the number required.

Accordingly, the classifications and the functions they perform as set out in the Schedule A are unaffected by this Section.

The Parties also agree in the Project Labor Agreement that, "No rules, customs, or practices which limit or restrict productivity, efficiency, or the individual and/or joint working efforts of employees shall be permitted or observed." Article V, Section I. This provision, coupled with the right to determine the number of employees hired, is vital to the Contractor's right and responsibility to direct the performance of the work, and does not require more workers than are necessary to perform the work.

The parties agree that they will keep an open channel of communication to insure that all parties to this agreement are fully informed of facts affecting the substance of this letter.

If you agree that this letter accurately sets forth the substance of our understanding and provides the basis for resolving any questions concerning the interpretation and application of Article III, Section 2, and Article V, Section 1, of the Project Labor Agreement, please indicate your acceptance in the space provided below.

Very truly yours,

/s/ Michael W. D'Antuono
MICHAEL W. D'ANTUONO
President

MWD:BWC:sm

Agreed and Accepted this 1st day of October, 1996.

International Union of Operating Engineers, Local 12.

By: /s/ William Waggoner
WILLIAM WAGGONER
Business Manager